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IN THE

Supreme Court of the United States

October Term, 1963

No. 984

STERLING EDWARD NEWCOMB,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinions below	2
Grounds on which the jurisdiction of this court is invoked	3
Questions presented for review	3
Statement of the case	4
Facts pertinent to the determination of the appeal and this petition	6
Reasons for granting the writ and argument amplifying the same	12
I. Certiorari should be granted to review the important search and seizure question arising as a result of a search and seizure of evidence later used by the government in the trial, evidence obtained without a warrant of arrest or search warrant	12
II. The court erred in finding that there was probable cause for the arrest and search	16
Conclusion	22

INDEX TO APPENDICES

Page

Appendix A—Opinion of the United States Court of Appeals for the Ninth Circuit 1

Appendix B—Judgment 11

Appendix C—Petition for Rehearing by Sterling Edward Newcomb 12

Appendix D—Order Denying Petition for Rehearing 16

Appendix E—Pertinent Constitutional Provisions and Statutes Involved 17

TABLE OF AUTHORITIES CITED

Cases	Page
Elkins v. United States, 364 U. S. 206	14
Jones v. United States, 362 U. S. 258	14, 20
People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905	14
Roviaro v. United States, 353 U. S. 53, 77 S. Ct. 623	19, 21, 22
Stoner v. California, No. 209, October Term, 1963, U. S. Law Wk. 3-24-64, pp. 4227-4228	13, 14
United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93	14

Statutes	
California Penal Code, Sec. 841	13
United States Code, Title 18, Sec. 471	1, 4
United States Code, Title 18, Sec. 474	2, 4
United States Code, Title 18, Sec. 3231	4
United States Code, Title 28, Sec. 1255(1)	3
United States Constitution, Fourth Amendment	4, 13, 14
United States Constitution, Fifth Amendment	4, 15

Textbook	
5 American Jurisprudence 2d, pp. 755-757	13

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STERLING EDWARD NEWCOMB,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Sterling Edward Newcomb, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming judgments of the United States District Court for the Southern District of California, sentencing Petitioner to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of five years on each of Counts One, Three, Four, Five, Six and Seven of the Indictment to run concurrently, charging Petitioner with having forged and counterfeited Ten Dollar Federal Reserve Notes, in violation of Title 18 U. S. C. Section 471, as charged in Counts One and Five of the Indictment,

and having aided in the printing and photographing of Ten Dollar and Twenty Dollar Federal Reserve Notes, in violation of Title 18 U. S. C. 474, as charged in Counts Three, Four, Six and Seven of the Indictment [G. T. Vol. 1, p. 50].[1]

Opinions Below.

Trial in the District Court was by a jury.

The opinion of the Court below is appended hereto as Appendix "A", and is also found in the Clerk's Record of the Circuit Court. The opinion below is as yet not reported. The judgment of the Court below is appended hereto as Appendix "B".

A petition for rehearing was made, a copy of which is attached hereto as Appendix "C". The order denying the same is attached to the RCA final page, and said petition for rehearing was by the Court denied March 13, 1964. A copy of the order denying the petition for rehearing is attached hereto and marked Appendix "D".

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[1]The record as certified to this Court by the Clerk of the Court of Appeals below consists of the proceedings in the Circuit (RCA) Court, Volume 1, and the Reporter's Transcript of the testimony taken at the trial, but with particular reference to the matters to be raised here, we call attention to the fact that a Second Supplemental Reporter's Transcript of proceedings had on October 8 and 9, 1962, before the District Court, contains the testimony with reference to the Motion to Suppress. The Second Supplemental Reporter's Transcript, which contains that evidence on the Motion to Suppress, will be referred to as [S.T.] for Supplemental Reporter's Transcript, and the regular transcript of the trial itself will be referred to as [R.T.], meaning the transcript of the evidence at the trial. The Clerk's Transcript will be referred to as [C.T.].

Grounds on Which the Jurisdiction of This Court Is Invoked.

I.

The date of the judgment sought to be reviewed and the time of its entry is January 24, 1961 (RCA Judgment).

The petition for rehearing timely filed was by the Court denied March 13, 1964 (RCA).

A copy of the order denying the petition for rehearing is attached as Appendix "D".

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U. S. C. 1255(1).

Questions Presented for Review.

1. The lower court erred in approving the receipt in evidence in the trial court over objection that the evidence was obtained as a result of an unlawful search and seizure, not incident to a valid arrest, and the trial court furthered in denying the motion to suppress. The Circuit Court erred in approving of the receipt in evidence of the questioned evidence and in approving the order of the lower court denying the motion to suppress (The evidence was obtained not incident to a valid arrest, no warrant of arrest had been obtained by the Federal Officers for the arrest of the defendant, neither were they fortified with, nor did they have, a search warrant).

1(a). Subsidiary to this question is the question as to whether or not exceptional circumstances existed which permitted the search or justified the same.

1(b). Subsidiary to this question is the question as to whether or not the petitioner was not prejudiced by

the refusal of the trial court to permit cross-examination of the officers as to the informant after the Government conceded he was not a reliable informant. Involved are the Fourth and Fifth Amendments to the Constitution of the United States, and Sections 18 U. S. C. 471 and 18 U. S. C. 474. They are set forth in Appendix "E".

Constitution Provisions and Statutes Involved. The Fourth and Fifth Amendments to the Constitution and 18 U. S. C. 471, 18 U. S. C. 474, are involved and set forth in Appendix "E".

Statement of the Case.

The Trial Court had jurisdiction under 18 U. S. C. 3231. By an Indictment filed in the Southern District of California, the Petitioner was charged in Counts One and Five of violation of 18 U. S. C. 471. In Counts Three, Four, Six and Seven, the Petitioner was charged with a violation of 18 U. S. C. 474, in substance charging counterfeiting of Government obligations under section 471 of 18 U. S. C., and possessing counterfeit Government obligations, and possessing Government plates for counterfeiting Government obligations, under 18 U. S. C. 474.

Petitioner, along with co-defendants, made a timely motion for suppression and exclusion of all of the counterfeit currency, plates, equipment, paraphernalia, papers, and other articles and physical objects which were on or about June 28, 1962, seized at 3300 Atlantic Boulevard, Long Beach, California, as a result of activities by agents of the United States, and that the described items be suppressed and excluded as evidence against the said petitioner.

Summarized, the motion was based upon the grounds that the said items were illegally seized by means of an unlawful breaking into said premises by said Agents against the will of petitioner and without a search warrant; that the search and seizure were not an incident to a valid arrest, nor did said agents possess a warrant for petitioner's arrest; that petitioner's arrest was illegal; that there existed no probable cause to justify the illegal search and accompanying seizure of the said items without a search warrant nor for the arrest of the petitioner. (The evidence concerning the motion to suppress and in support thereof is found in [S. T. Transcript of Proceedings October 8 and 9, 1962, pp. 1 to 272]. The matter was heard, argued, briefed, and by the court denied. Prior to the trial, petitioner again moved the court to reconsider its ruling [2 R. T. pp. 5, 8]. It was further stipulated that the introduction of any counterfeit items at the trial would be deemed objected to. This was agreed to by the Court and counsel for all parties [2 R. T. pp. 7-11].

The objects seized on June 28, 1962, were admitted into evidence over objection, and petitioner was convicted on Counts One, Three, Four, Five, Six and Seven as charged in the Indictment.

On April 15, 1963, judgment was entered and sentence imposed against petitioner, the sentence being five years on each count, the sentences on all counts to run concurrently. The two co-defendants were acquitted. By appeal, the matter reached the Circuit Court for the Ninth Circuit, and the judgment pronounced in the lower court was by that court affirmed (See Judgment attached hereto and opinion attached hereto in the appendix).

Facts Pertinent to the Determination of the Appeal and This Petition.

(All of the references cited refer to the Second Supplemental Reporter's Transcript of Proceedings had on October 8 and 9, 1962, and hereinafter described as [S. T.]).

Prior to the trial, motion to suppress was duly made by petitioner Newcomb and his co-defendants. Appropriate written motions were made and an oral motion [S. T. pp. 4-7]. Summarized, the grounds were that all counterfeit currency, counterfeit plates, equipment, paraphernalia, papers, and other articles and physical objects, which on or about June 28, 1962, at the premises located at 3300 Atlantic Boulevard, in the City of Long Beach, State of California, were unlawfully seized and removed from the premises by agents of the United States. Said motion was to the effect that the said items were illegally seized by means of an unlawful breaking into the premises by the agents of the United States against the will of the defendants and without a search warrant. That the search and seizure were not incident to a valid arrest, nor did the agents possess a warrant for the defendant's arrest; that the arrest of the defendant was illegal. There was no probable cause to justify the arrest, nor the search and seizure without a search warrant or a warrant for their arrest [S. T. pp. 4-5]. It was then stipulated that there was no warrant for the arrest of either Newcomb or Brining, nor was there a warrant to search the premises in which the contraband was discovered [S. T. p. 6].

Kenneth Thompson, United States Secret Service Agent, met an individual on June 27, 1962, at Stan's Playroom in the town of Maywood, California [S. T. pp. 10, 23]. Thompson had never met nor used this informant before, nor was he designated as a reliable informant by any other Agent [S. T. pp. 27, 28]. Another Agent, Sheridan, informed Thompson that an individual had telephoned the day before claiming to have knowledge of a counterfeiting operation in the Long Beach area, and this Agent Sheridan arranged the rendezvous between the individual and Thompson [S. T. pp. 29-30]. The individual whom Thompson met stated that the three defendants were counterfeiting Ten Dollar Bills at the Precision Products Company, 3330 South Atlantic Avenue, in Long Beach; the company was engaged in the sale of doors, window sills, plywood, and such items. He further gave a description of the vehicles each was driving; he gave the address of Harding and some information as to the police record of Newcomb, the petitioner, and Harding [S. T. pp. 10-12]. He stated to Thompson that Brining lived on Brookshire, in Downey, and that the exact address could be obtained from the telephone book. Thompson said he verified this from the telephone directory. They were not able to obtain the street number of Harding's address. This person informed Thompson that Newcomb and Harding had an apartment at 24 Sixth Place, in Long Beach. The vehicle registrations were verified through the Department of Motor Vehicles as being registered to the respective defendants [S. T. pp. 12-14].

On cross-examination of the Government Agent, petitioner's counsel inquired as to the name of the informant. Thereupon, an objection was entered by the Government, claiming the privilege not to disclose the identity of the informant, and then claimed he was a reliable informant. The Government made no showing of any reliability, nor why exactly the informant's identity should not be revealed. Further cross-examination revealed that his reliability had not been established by his furnishing prior information [S. T. pp. 24-28]. The Court sustained the objection and the Government did not disclose who the informant was [S. T. p. 39].

Petitioner's counsel attempted to learn if the informant had given any information to the effect that he, personally, had seen the paraphernalia, the plates, or the counterfeit money at the premises occupied by Newcomb [S. T. p. 38]. The Government objected and, after argument, the Government agreed that the man did not have any prior or previous reliability as far as the Government was concerned [S. T. p. 43]. The Court sustained the objection [S. T. p. 55].

On the evening of June 27, 1962, at about 9:00 p.m., Agents Thompson, Weaver and Sheridan went to the apartment at 24 Sixth Place, Long Beach; they saw Newcomb and Brining moving a cardboard box on to Brining's truck; Brining drove away; they had not followed either of the two defendants to the apartment; their names were not found on the mail box, nor did

the agents inquire of the apartment manager as to whether they reside there [S. T. pp. 14, 15, 58-60]. At the time the Agents saw them moving this box, he did not know whether it was marked with the word "Furniture" or at all; it was at night, there was only two small lights present. He had no information or no way of knowing what was in the boxes [S. T. pp. 58, 59]. He did not know whether Newcomb lived at the apartment or not.

During the latter part of that afternoon, Agent Horn telephoned the Carpenters Printing Company, speaking to a Mr. Blair, and inquired as to whether or not the Precision Products Company of Long Beach had purchased any paper. Later Blair informed Horn that a Mr. Newcomb, of Precision Products, had made purchases of several types of paper on various dates, purchasing 8½x11, NO. 20 Lancaster, 100% rag bond paper. This type of paper closely approximated the paper used in United States Currency stock [S. T. pp. 137-145]. He stated that this paper could be used for the printing of brochures, good letterheads, and other commercial uses [S. T. pp. 137-145, 155, 156].

The following morning, Agents Thompson and Sheridan arrived at Precision Products, placed the building under surveillance; Agents Weaver and Horn had arrived approximately a half hour earlier; Newcomb's car was parked in front of the building. Shortly after their arrival, Newcomb went to his vehicle, removed a small box therefrom, and returned to the Precision

Products building. At approximately 9:45 a.m., Brining arrived; the door was unlocked and Brining entered the building. Twenty minutes later Newcomb left the building, leaving the door ajar, and walked to the mail box. Thereafter, he returned to the building [S. T. pp. 16, 20].

Thompson then went to a telephone booth and called the United States Attorney and gave him the facts so they could prepare an affidavit and take it to the Commissioner to see if a search warrant could be obtained. No arrangements had been made as to how the warrant would be picked up or delivered to Thompson, or any of the agents, in the event the Commissioner issued the same. It was decided by the Agents that they would keep the building staked out and leave everything alone unless it appeared that the people inside were going to permanently move out and not be expected to return [S. T. pp. 24, 65, 66]. While Thompson was phoning the United States Attorney's Office, Agent Sheridan arrested Newcomb. Agent Weaver testified Newcomb came out and put an object on the passenger's side of the vehicle and then got into the driver's side of the vehicle. Agent Horn was stationed at the rear of the building. Weaver and Sheridan rushed up to the car and Sheridan placed Newcomb under arrest, handcuffing him inside the vehicle. None of the Agents inspected the material on the front seat of the vehicle prior to entering the premises. Weaver then tried the front door by rattling it, and did not knock or announce that he was a Federal Officer.

He then went back to Newcomb to obtain the keys for the purpose of entering. When Brining pushed the drapes aside to look out of the window, he thereupon broke down the door and entered the premises with Agent Horn following behind him, having come from his position at the rear of the building [S. T. pp. 184, 188, 195, 199, 201]. When the Agents entered, Brining was seated at a desk in the front office; he was placed under arrest by Agent Horn [S. T. p. 172].

None of the Agents had looked through the high rear window adjacent to the alley entrance prior to entering the building.

When Newcomb was out on the parking lot in his vehicle, there was no illegal activity of any kind [S. T. p. 211].

Upon entering the building, they saw nothing of an illegal nature or illegal activity; it was not until they unlocked the darkroom door that they found anything of an illegal nature [S. T. p. 212]. The Agent who entered the darkroom inside of the building used either a screw driver or a knife to assist in opening the door [S. T. p. 191].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME.

I.

Certiorari Should Be Granted to Review the Important Search and Seizure Question Arising as a Result of a Search and Seizure of Evidence Later Used by the Government in the Trial, Evidence Obtained Without a Warrant of Arrest or Search Warrant.

Petitioner Newcomb was arrested and handcuffed in his car as he got in the car with a box (there was nothing found in the car or box of an illegal character; the box contained figurines, not contraband). (See footnote, p. 7, of Opinion of Lower Court, RCA and Appendix A).

It was stipulated the Federal Officers had neither a warrant of arrest or search warrant at the time they searched the premises in which the contraband was found [S. T. p. 6, lines 7-22].

One of the officers was actually telephoning the United States Attorney [S. T. p. 27, line 2; pp. 65-66], to see if a search warrant of the building near which Newcomb (petitioner) was arrested as he entered his car. The other officers seeing Newcomb enter the car arrested him prematurely and impulsively, then took him to the building and broke the door down and entered. No one was running, no one was hiding, attempting to destroy evidence, hide weapons, or obtain weapons. In fact, Newcomb had done an innocent act by taking the box containing the figurines to his car where he was arrested and handcuffed. Brining, the co-defendant, was seated at a desk in the front office (apparently doing nothing illegal) when arrested by one of the of-

ficers, and nothing of an illegal nature was in view of the officers as they entered the building [S. T. p. 172, lines 4-24]. They unlocked a darkroom door in the building proper, using a screw driver or a knife to assist in gaining entrance [S. T. p. 209, lines 4-25; p. 212, lines 6-21; p. 191, lines 9-19], where the contraband was found. The door to the building proper had been broken down by the Federal Agents, who then entered, taking Newcomb in with them [S. T. p. 184, line 10; p. 185, line 23; p. 195, lines 15-24; p. 199, line 7 to p. 201, line 24].

None of the agents had announced they were Federal Officers or the object of their business.[2]

The requirement for a warrant to conduct a search flows from the Fourth Amendment to the Constitution and is "not to be eroded by strained applications." *Sonce v. California*, No. 209, October Term, 1963, U. S. Law Wk. 3-24-64, pages 4227-4228, where the Court had this to say:

> "It is unnecessary and ill-advised to import into the law surrounding the Constitutional right to be free from unreasonable searches and seizures settled distinctions developed and refined by the common law in evolving the body of private property law which more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. We ought not to bow to them in the fair administration of the criminal law. To

[2]California law provides: "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it . . ." California Penal Code, Section 841. This requirement is the general law in the United States (5 Am. Jur. 2d 755-757).

do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime.' *Jones v. United States*, 362 U. S. 258, 266, 267.

In *Stoner, supra*, the Court had this to say:

"The search of the petitioner's room by the police officer was conducted without a warrant of any kind and it therefore 'can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant'. (Citing Jones v. United States, 257 U.S. 493, 499; United States v. Jeffers, 342 U.S. 48-51; Rios v. United States, 264 U.S. 253, 261.)"

The courts throughout the United States have been alert to protect persons from unlawful search and seizures as guaranteed by the Fourth Amendment to the Constitution. As an example, California, after more than fifty years, reversed the law in *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, which case and its reasoning apparently was approved by this Court in *Elkins v. United States*, 364 U. S. 206 (1960).

We respectfully urge that this doctrine has been repeatedly stated and was set forth in *United States v. Jeffers*, 342 U. S. 48, 72 S. Ct. 93, and there the Court said:

"The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both 'houses' and 'effects.' Over and over again, this court has emphasized that the mandate of the amendment requires ad-

> herence to judicial processes (citing cases) . . . Only where incident to a valid arrest (United States v. ? 339 U.S. 56, or in 'exceptional circumstances' (Johnson v. United States, 333 U. S. 10, 68 S.Ct. 367 (1948). may an exemption lie, and then the burden is on those seeking the exemption to show the need for it.' McDonald v. United States, 335 U.S. 451, 456, 69 S.Ct. 191 (1948). In so doing, the amendment does not place an unduly oppressive weight on law enforcement officers, but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended. Johnson v. United States, supra. Officers instead of obeying this mandate have too often, as shown by the numerous cases into this court, taken matters in their own hands and invaded the security of the people against unreasonable search and seizure."

We respectfully urge that in this particular case the Fifth Amendment to the Constitution comes into play, for Newcomb was seized in an automobile away from the building searched, and he was forced, handcuffed to go to the building, the building was entered by the officers knocking the door in, they entered with this man handcuffed, and in effect, he was compelled to testify against himself (in violation of the Fifth Amendment to the Constitution).

We respectfully urge that the seizure in this case and the arrest were invalid; there was not probable cause. Circumstances of the case were such as they might well have been committed by an innocent person. All of the information supplied by the so-called informant

or "tipster" which was supplied to the officers, might well have affected anybody with the exception of his statement that counterfeiting was being carried on in the building. For instance, he gave some information about the occupations, the residences of the parties, the place of business; the type of vehicles, and former criminal record. These items could be supplied by most anybody about most any person by doing slight checking and by resort to either a city directory or a telephone directory. Most everyone has some business, some place of abode and some occupation, and all too many people have suffered an arrest of some sort which in most instances is of little consequence, and particularly was of small consequence in this case. We do not believe that the information supplied justified the action in this case. It should be borne in mind that the officer apparently in charge of the investigation was attempting to confer with the United States Attorney about obtaining a search warrant; he recognized the necessity therefor, when the other officers hastily acted, and we contend without cause.

II:

The Court Erred in Finding That There Was Probable Cause for the Arrest and Search.

In the Opinion of the lower court set forth in the appendix and in (RCA) the Court said:

> "We cannot hold the trial court was in error in concluding there existed in the minds of the arresting officers probable cause for belief in the reliability of the informant, who had told them the defendants were counterfeiting ten dollar bills on the premises; or, that one defendant was about to leave the locality. Having probable cause to rely

on the reliability of the informant, the officers had probable cause (a) to seek a warrant of arrest, and (b) to arrest without a warrant where a chance to escape or to destroy evidence existed. The officers in view of the circumstances existing at the time of Newcomb's arrest, and the actions of his associates, had probable cause to forcibly enter the premises in order to prevent escape and to forestall the destruction of evidence by the defendants other than Newcomb. The search of the immediate premises then being incidental to a lawful arrest was proper and the evidence disclosed and discovered thereby admissible if relevant and material as it most surely was."

We respectfully urge that the facts as set forth in the statement of facts herein, and the things known to the officers at the time of the arrest and the resulting search, were not sufficient to justify the arrest without a warrant and the resulting search without a search warrant, especially in view of the fact that the officer in charge of the case was at the very time of the arrest and search attempting to contact the United States Attorney to ascertain whether or not a search warrant could be obtained [S. T. p. 21, lines 2-9; p. 65, line 6, to p. 66, line 22]. Thompson had gone to a telephone booth and called the United States Attorney and gave him the facts so that an affidavit could be prepared and presented to the Commissioner to see if a search warrant could be issued. No arrangements at all had been made as to how the warrant would be picked up or delivered to Thompson, in the event it would have been issued. It was decided by the agents that they would keep the building staked out and leave everything

alone unless it appeared that the people inside were going to permanently move out and not be expected to return.

It was during this telephone conversation that Newcomb was arrested by Agent Sheridan, and the search immediately followed. Newcomb, of course, was arrested in an automobile under circumstances which did not warrant any justification that he had contraband in his possession, as he did not, or that he was about to lee the premises.

By reason of the holding of the court, the refusal of the trial court to order the Government to disclose the name of the informant, especially in view of the fact that there was no evidence that he was a reliable informant, comes doubly into play.

Counsel for petitioner asked Officer Thompson, "What is the name of this informant?" Thereupon, an objection was made by counsel for the Government to the effect that the Government desired to exercise its privilege of not disclosing its informant [S. T. p. 24]. Thereafter, considerable argument ensued and urged "that the occasions upon which the Courts have required the Government to divulge the informant's name when the reliability of the informant is in question such as in the Costello case (Costello v. United States, 298 F. 2d, 950, 9th Cir. 1962)" [S. T. pp. 25, 26]. The officer admitted that he had never met this informant before June 27, the date of his discussion with him, that he never had called in to him any information before, except regarding these three defendants. He had not used him before on any other case; he had not been supplied with the name of this informant as a reliable

informant by any other agent [S. T. p. 27, line 14, to p. 28, line 12].

It was apparently conceded by all that the informant was not a reliable informant, as the court stated during the discussion of *Roviaro* and other cases on this particular problem, as the trial court said, "But as I understand it, it is conceded by everybody that the informer was not a reliable informer, had no information about him before and that they, the Government, is not attempting to rely upon the information which he gave." [S. T. p. 49, lines 12-15] Then, the United States Attorney stated, in response to a statement by Mr. Augustine (counsel for petitioner) to this effect:

> "Mr. Augustine: Am I correct, Your Honor, in assuming then that this will not be used as an element to establish probable cause. The tip from this individual; that the Government will have to produce additional evidence sufficient to—
>
> "The Court: That was my understanding of their position.
>
> "Mr. Philsinger(?): That's not correct, Your Honor. I realize it's getting—
>
> "Mr. Philsinger (Counsel for Government): I don't want to jump both sides of the fence as defense counsel said. There is an additional problem in this matter. The Government's position is that it does not intend to reveal or disclose the identity of the informer. Therefore, the Government is in a position where it is required to object when certain evidence or certain conversation which involves the informant and the agent on the stand may tend to disclose the informant. The Government intends to rely upon the information supplied by

> the informant and depends or relies on the following observations as asserted by the witness to make him rely upon it." [S. T. p. 49, line 11, to p. 50, line 22].

It is obvious that the Government was relying upon this informant and that they refused to disclose the name of the informant. The defendant, under all the circumstances of this case, was entitled to know who this informant was and many things about him or her. Counsel for the Government stated:

> "The Government agrees that this man does not have any prior or previous reliability as far as the Government is concerned" [S. T. p. 43, lines 13-15].

With all due deference to the Government, they were blowing both "hot" and "cold", and the defendant-petitioner was entitled to know by way of cross-examination what information the informant had, who he was, upon what did he base his statements that "counterfeiting" was going on at a certain location and was being conducted by the appellant and others. They had a right to know what he was, and whether or not he was actually a participant and what consideration, if any, had been given to him. This was denied to the appellant, and this, we respectfully urge, was serious error, which should warrant review by this court. It is appropriate here to quote briefly from *Jones v. United States*, 362 U. S. 257, 272, where Mr. Justice Douglas said:

> "I join the part of the opinion which holds that petitioner had standing to challenge the legality of the search. But I dissent from the ruling that there was probable cause for issuance of the war-

rant. The view that there was probable cause finds some support in Draper v. United States, 358 U. S. 307, but my dissent in Draper gives I think the true dimensions of the problem. This is an age where faceless informers have been reintroduced into our society in alarming ways, sometimes their anonymity is defended on the ground that revelation of their names would ruin counter-espionage or cripple an underground network of agents. Yet I think in these Fourth Amendment cases the duty of the magistrate is undeniable. It is not sufficient that the police think there is cause for invasion of the privacy of the home; the judicial officer must also be convinced, and to him the police must go except for emergency situations. The magistrate should know the evidence on which the police propose to act. Unless that is the requirement, unless the magistrate makes his independent judgment on all the known facts, then he tends to become merely the tool of police interests. Though the police are honest and their aims worthy, history shows they are not appropriate guardians of the privacy which the Fourth Amendment protects."

Even Officer Thompson in this case was seeking a search warrant with the help of the United States Attorney when the arrest and search were untimely made.

As was said in *Roviaro v. United States*, 353 U. S. 53, 77 S. Ct. 623, at 353 U. S. 61:

"A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness where the disclosure of an informant's

identity or the contents of his communication is relevant and helpful to the defense of an accused or is essential to a fair determination of the cause, the privilege must give way. In these situations the trial court may require disclosure, and if the Government withholds the information dismiss the action.

We humbly suggest that *Roviaro* (*supra*) is complete authority for our position that the name of this informant should have been disclosed and through cross-examination permitted. This petitioner was denied due process and a fair trial by reason of the limitations placed upon the cross-examination of the officer and the failure to disclose the informant.

Conclusion.

The petition for writ of certiorari, we respectfully pray, should be granted and the judgment reversed.

Respectfully submitted,

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Sterling Edward Newcomb.

PAUL AUGUSTINE, JR.,
Of Counsel.

APPENDIX "A".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Sterling Edward Newgomb, Appellant, vs. United States of America, Appellee. No. 18,791.

Jan. 24, 1964.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Hamley and Duniway, Circuit Judges.

Barnes, Circuit Judge:

This is an appeal from a denial of a motion to suppress certain evidence, introduced at a trial wherein appellant and two others were charged with two counts of counterfeiting and three counts of possession of counterfeiting equipment. Appellant was convicted on five counts, and sentenced to five years imprisonment, to run concurrently as to each court. (18 U.S.C. §§471 and 474.) The district court had jurisdiction (18 U.S.C. § 3231), as do we on this appeal (28 U.S.C. §§ 1291 and 1294).

The appeal was convicted and his guilt is not raised on this appeal. The appeal involves but one question: Was the trial judge correct in ruling that there was no unlawful search and seizure of the evidence which was the subject of the motion?

Authorities were notified that appellant and his two codefendants were counterfeiting United States currency (ten dollar bills) at Precision Products Company, 3330 South Atlantic Avenue in Long Beach, California.

The government conceded that the informant "does not have any prior or previous reliability as far as the government is concerned." (Tr. p. 43, ll. 13-15.)

The premises described above (wherein the counterfeiting equipment was located and from which it was taken) were entered by the officers by force and without a search warrant. They did this immediately after the arrest of appellant without a warrant, as he was getting into his automobile in the street in the front of said premises.

The search was lawful only if it was reasonable in view of the situation then and there existing and incidental to a lawful arrest.[1] The arrest without a warrant was lawful only if there existed probable cause for the belief by the officers that counterfeiting by defendants was going on on the said premises. A secret service officer[2] (and these were) may arrest without a warrant and conduct a search incidental thereto if he has probable cause within the meaning of the Fourth Amendment and United States Code, Title 18, § 3056.[3]

Did the Treasury Department officers have probable cause for the arrest and accompanying search? They did not, says appellant, (a) because the informant was

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[1] "Search and seizure incident to lawful arrest . . . has long been an integral part of the law-enforcement procedures of the United States." *Harris v. United States*, 1947, 331 U.S. 145, 150-151; *United States v. Rabinowitz*, 1950, 339 U.S. 56; *Abel v. United States*, 1960, 362 U.S. 217.

[2] United States Secret Service, Treasury Department.

[3] Title 18, United States Code, Section 3056, which authorizes Secret Service agents to arrest, reads in pertinent part:

> ". . . the United States Secret Service, Treasury Department, is authorized to . . . detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States. . . ."

unknown originally to the officers, and had no previously proven reliability; (b) the subsequent information acquired by the officers subsequent to the "tip" and prior to the arrest were all of "innocent" facts, *i.e.*, as consistent with innocence as with guilt; (c) the government refused to name the informant.

The latter point is the first urged by appellant. We see no relevance in it to the sole matter here under inquiry—was there probable cause? The reluctance of the government to name its informers probably increases each time the known reliability of its previous tip is established. But this subsequent reluctance cannot alter the facts the officers had before them when their determination of reliability and probable cause was made.

The first ground urged is more substantial, but not controlling. The arresting officer did not act on the bare "tip" alone, but on the tip (accepted as being one from an informant of unknown reliability) plus certain confirming facts. These obviously and admittedly were required to establish the reliability of the information originally secured.

Whether this subsequent information is made up of "innocent" and "lawful" acts is of little consequence. The question is what probative force they have: not individually, but collectively, and as they fit into the jigsaw pattern of the entire picture.

The trial judge here had the following facts in mind, all of which were alleged to have had some small or great influence on the totality of the information in the officers' possession when they came to the conclusion there was probable cause for the arrest of Newcomb.

This information as set forth in the margin is, as stated by the government, not disputed by the appellant.[4]

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[4] "On June 27, 1962, at about 2:00 P.M., Secret Service Agent Kenneth Thompson, met with an unidentified person in a drive-in restaurant. This person hereinafter referred to as the informant, told Agent Thompson that David Harding, William Brining, and appellant were counterfeiting $10 bills at Precision Products Company, 3330 South Atlantic Avenue in Long Beach, and that the operation had been in progress for two to three months. He also stated that Precision Products Company was a business engaged in the sale of doors, window sills, plywood and other construction items.

The informant described to Agent Thompson the individuals involved; and the types, years, and colors of the vehicles that they were driving; that appellant was driving a 1961 Corvair Monza, bronze, colored, two-door; that Brining was driving a white 1962 Chevrolet pickup truck, without license plates, and that Harding had a blue 1961 Corvan in addition to several other cars. He also related that two of the people he described had police records.

The informant stated that Brining was assisting the appellant who was printing the notes; that Brining had a financial interest in the counterfeiting operation.

Informed of the meeting by Agent Thompson, Agent Darwin Horn, on June 27, 1962, contacted the Carpenter Paper Company in Long Beach, California, and was advised that Precision Products, under the name of the appellant, had purchased a 1,000 sheets of 8½ by 14 No. 20 Lancaster, 100% rag bond paper on May 11, 1963.

At about 5:30 P.M., of the same day, Secret Service Agents took up surveillance at Precision Products and remained there until 1:30 A.M. Agent Thompson observed a night light shining through a curtain which appeared to emanate from a fluorescent table lamp.

At about 9:30 P.M. that evening, Agent Thompson, with three other agents, went to an apartment house at 24 Sixth Place in Long Beach, while two agents remained at the stake out at Precision Products. Agent Thompson observed a Chevrolet pickup truck, without license plates, in the underground garage at that address. The appellant and Brining were seen moving a large cardboard box from the stair well to the pickup truck and a short time later Brining drove the pickup truck away. Agent Thompson testified that he knew the man was Brining because he was so described earlier by the informant who had also advised that the appellant and Harding had an apartment at the Sixth Place address.

Thus, the following facts gave *some* corroboration, at the least, to the "tip," and consequently to the reliability of the informant:

Agent Horn, on the same evening, checked the police records relative to the appellant and Harding. He advised Agent Thompson that appellant had been convicted of robbery and served a five to life sentence; that he had another sentence of six months to 50 years for statutory rape; and that his occupation at the time of arrest by the Long Beach Police Department was lithographer. It was also determined that the records at the Los Angeles County Sheriff's Office showed that Harding had a felony conviction for burglary in 1952.

On June 28, 1962, Agents Thompson, Horn, Weaver and Sheridan took up surveillance at 8:00 A.M., across from Precision Products at 3330 Atlantic Boulevard (sic). Agents Horn and Thompson posed as salesmen in a nearby car agency, and the two other agents occupied a deserted building located about 50 feet from the front door of Precision Products. Agent Thompson noted that there was a large sliding door and a smaller door in the rear of the Precision Products Building, and one front door. The windows at the rear were 12 feet above the ground and the front windows were heavily draped. When the agents arrived, the 1961 Corvair Monza was already in a parking lot at the front of the building, just to the north of the entrance door. A check of the license number was made with the Department of Motor Vehicles and it was found to be registered to the appellant. Shortly after surveillance began, the appellant was observed exiting from the front door, walking to the Corvair Monza, removing a small box and going back into the building. The door appeared to be locked and had to be unlocked before the appellant could re-enter.

At approximately 9:45 A.M., Brining drove up in the Chevrolet pickup, parked the vehicle and went into Precision Products. The door had to be unlocked before Brining could enter.

Precision Products did not appear open for business from 8:00 A.M. to the time of the arrest later that morning. The only persons observed entering the building or leaving the building were the appellant and Brining. About 20 minutes after Brining arrived, the appellant left the building and walked to a mail box. Shortly thereafter, Agent Thompson went to a nearby telephone to call an Assistant United States Attorney to obtain a search warrant. It was agreed that while Agent Thompson was making the call, no action would be taken unless the persons in the building were leaving and not expected to return. Agent Thompson advised the Assistant U.S. Attorney of the plan, and provided him with the known facts in order to obtain a search warrant. He requested that an affidavit for a search warrant be prepared.

(1) The individuals named were conducting some operations at 3330 South Atlantic Avenue, Long Beach, California.

(2) Whatever they were doing was business conducted in an unusual manner.

(a) The doors were kept locked during business hours.

While Agent Thompson was conversing with the United States Attorney's Office, the appellant was arrested by Agent Sheridan as he entered his vehicle in front of Precision Products. Appellant had opened the passenger side of the vehicle and placed something inside and then walked around the car, getting in the driver's side. In accordance with a prearranged plan, Agent Sheridan went around on the driver's side and Agent Weaver proceeded up to the passenger's side; Agent Sheridan then placed the appellant under arrest; and Agent Horn rushed to the rear of the building.

Immediately after the arrest of appellant, Agent Weaver tried the front door—rattling it. He informed Agent Sheridan that the door was locked and the keys to the building were requested of appellant. Agent Sheridan then shouted, 'He is looking out of the window.' The person inside the building had pulled the drape aside, looked out, quickly replacing the drapes in a closed position. He could observe the arrest of Newcomb, who at that moment was being placed under arrest while seated behind the wheel of his car. Newcomb's hands were raised to his eye level, as Sheridan handcuffed him.

Agent Weaver then went back to the building and pushed the door open. He entered Precision Products; observed Brining at a desk in the front room and told him he was under arrest. Agent Horn was right behind him having returned from the rear of the building.

The front office was about 10 by 20 feet, and partitioned off except for a door that led into the back portion of the building. Agent Weaver entered the rear area of the building where he observed a camera and a printing press. A small room was located at the rear, but the door was either stuck or locked. Agent Weaver testified that he believed someone might be in that room, as he had observed a third person in the vicinity of the building earlier that morning and thought he had entered Precision Products from the rear door. The appellant was brought into the back room and advised the agents that the door sometimes sticks and a knife or screw driver was required to get in. Entry was eventually made to the dark room and the counterfeit currency found there."

(b) The rear windows were twelve feet above the ground.

(c) The front blinds were kept drawn.

(d) Lights were kept on after ordinary hours, and until 1:30 A.M.

(e) There appeared to be no transactions taking place relating to the announced retail business of selling doors, window sills, plywood, and other construction items.

(3) The accuracy of "two defendants having police records" was established. (a) Defendant Newcomb had two previous felony convictions: one for robbery[3] and one for statutory rape, with a sentence of six months to fifty years. (b) Defendant Harding had a previous felony conviction for burglary.

(4) It was discovered through the police records that defendant Newcomb was a "lithographer."

(5) The informant's information as to the three cars used by defendants—their types, makes, registrations, years and colors (even that one had no license plates) was confirmed by officers' observance thereof.

(6) The observations of the officers at 24 Sixth Place, Long Beach, at 9:30 P.M. disclosed the use by Brining and Newcomb of Brining's Chevrolet pickup truck to move large cardboard boxes from an apart-

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[3] The sentence imposed for this crime—five years to life—indicates the probability it was for first degree robbery, which in California is one perpetrated by torture (or, more usually) by one armed with a dangerous or deadly weapon. Cal. Penal Code §§ 211, 211a, 213. This information has some bearing on the actions of the officers immediately after the defendant's arrest.

We need not pass on whether the investigating officers should or should not or could or could not have considered whether any suspect had a propensity toward anti-social behavior.

ment. At the least this disclosed activity between two of the defendants apart from that usually associated with ordinary daytime business; and, additionally, confirmed the accuracy of some of the informant's statements.

(7) Probably most significant of all, independent investigation disclosed the purchase by Precision Products, through appellant, of 1000 sheets of 8½ by 11, No. 20 Lancaster 100% rag bond paper on May 11, 1963.

(8) This paper was the type used to print bonds and stock certificates and was frequently used by counterfeiters of United States currency, as "the best available stock" for their efforts; in fact a purchase of this type of paper was a generally recognized "red flag" insofar as the investigation of counterfeiting by government secret service agents was concerned.[6]

(9) The date of sale of such 100% rag bond, being forty nine days prior to the receipt of the information, confirmed the "three months period" during which the alleged counterfeiting was taking place.

(10) Later in May, appellant had purchased 2500 sheets of 8½ by 11 25% rag bond or ivory paper. This type was "sometimes" used by counterfeiters.

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[6] Agent Horn testified: "Well, this type of paper, of course, is a very fine, good type of paper. Has a body to it that will stand up. Not as good as the paper that our currency is produced on, but it will stand up almost as well as any type of paper that is produced in a similar thickness of our currency. In other words, this—if you are going to counterfeit bills, this would probably be the best type of paper to obtain."

Agent Thompson testified: "Well, this is about as close as you can come to duplicating the genuine paper that U.S. currency is printed on, which is a hundred percent rag content. It is also a very expensive paper, costing much more than, say, even a 25% rag bond, and its just not commonly used."

The purchase was not, therefore, necessarily an "innocent" act.

(11) The delivery of 100% or 25% rag bond paper in such quantities was in each instance an unusual delivery to a business supposedly selling doors, window sills, and plywood.

(12) The defendant Newcomb, just prior to his arrest, left the premises, placed a box in his car[7] and prepared to leave in his auto.

The surveiling officers had concluded they had sufficient cause to obtain a search warrant, and search the premises. An officer went to a nearby telephone to ask for it of an Assistant United States Attorney when the remaining officers saw the defendant Newcomb about to leave the premises with the box, large enough to have contained a substantial sum of counterfeit money.

Rather than risk the possible placing of an undetermined amount of counterfeit currency in circulation they arrested defendant Newcomb. One agent went to the locked front door and rattled it, calling to the officer arresting Newcomb to obtain his (Newcomb's) keys to the front door. At that moment someone inside parted the curtains, saw Newcomb's arrest (Newcomb's hands were above his head) and quickly closed the curtains. The officer at the front door then forced it open, arresting Briming inside on suspicion of counterfeiting and searched the premises, discovering the counterfeiting equipment which is the subject of the motion to suppress.

We cannot hold the trial court was in error in concluding that there existed in the minds of the arrest-

[7]This box contained "figurines," not counterfeit money, when opened by the officers.

ing officers probable cause for belief in the reliability of the informant who had told them the defendants were counterfeiting ten dollar bills on the premises; or, that one defendant was about to leave the locality. Having probable cause to rely on the reliability of the informant, the officers had probable cause (a) to seek a warrant of arrest, and (b) to arrest without a warrant where a chance to escape, or to destroy evidence, existed. The officers, in view of the circumstances existing at the time of Newcomb's arrest and the action of his associates, had probable cause to forcefully enter the premises in order to prevent escape and to forestall the destruction of evidence by the defendants other than Newcomb. The search of the immediate premies, then, being incidental to a lawful arrest, was proper and the evidence disclosed and discovered thereby admissible if relevant and material, as it most surely was.*

The order of the district court denying the motion to suppress the evidence, and appellant's conviction based thereon, are each *affirmed*.

(Endorsed) Opinion Filed January 24, 1964.

Frank H. Schmid, Clerk.

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*". . . while 'an arrest with or without a warrant must stand upon firmer ground than mere suspicion . . . the arresting officer need not have in hand evidence which would suffice to convict.'" *Elkanich v. United States*, 9 Cir. 1964, ... F.2d ... (No. 18702, dec'ded January 13, 1964), citing and quoting from *Wong Sun v. United States*, 371 U.S. 471, 479, which also holds: "Probable cause . . . must be measured by the facts of the particular case." (Page 479.)

APPENDIX "B".

Judgment.

United States Court of Appeals for the Ninth Circuit.

Sterling Edward Newcomb, Appellant, vs. United States of America, Appellee. No. 18791.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of California, Central Division, and was duly submitted. On consideration whereof it is now here ordered and adjudged by this court that the order of the District Court denying the motion to suppress the evidence and judgment of the said District Court in this cause are each affirmed.

Filed and entered, January 24, 1964.

APPENDIX "C".

Petition for Rehearing by Sterling Edward Newcomb.

United States Court of Appeals for the Ninth Circuit.

Sterling Edward Newcomb, Appellant, vs. United States of America, Appellee. No. 18791.

To the Honorable Judges of the Above-Entitled Court:

Comes Now the appellant Sterling Edward Newcomb and respectfully petitions the above-entitled court for a rehearing as to him, and urges:

I

THE EVIDENCE (CONTAINED) WAS RECEIVED IN EVIDENCE OVER OBJECTION AND WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE AND NOT INCIDENT TO A VALID ARREST.

A. Subsidiary to this is the finding by both the trial court and this court that the evidence or information in possession of the officers at the time of the arrest and the search was sufficient. With all due deference to the court, the evidence in possession of the officers at the time, and summarized in the margin of this court's opinion, was not enough to outweigh the protection afforded by the Fourth and Fifth Amendments to the federal constitution.

There was no warrant of arrest and no search warrant.

B. Lacking a warrant of arrest and search warrant, the officers apparently in charge of the case was

actually attempting to contact the United States Attorney about obtaining a search warrant—when the other officers, we contend, without reasonable cause therefor "jumped the gun" and made the arrest of appellant, your petitioner. No one was fleeing the scene, nor was there any basis for belief on the part of the officers that any evidence was to be or was being destroyed.

C. Further subsidiary to the question is the fact that "The government agrees that this man (informant) does not have any prior or previous reliability as far as the government is concerned." (R. T. p. 43; lines 13-15.)

D. Further subsidiary to the question is the proposition that the informant was not known to be reliable. A reliable informant means a person whose information has in the past led the police to valid suspects. Such is not the case here. And in view of what the officers knew at the time of the arrest and search, it may be said it is only in the case of a pressing emergency that an arrest or search without a warrant may be justified based upon information secured from an informant or from an informant not known to the officer to be reliable.

E. In connection with this, may we point out that the appellant was entitled to know, by way of cross examination (which is recognized as one of the most powerful weapons in the possession of a defendant), what information the informant had, who he was, upon what did he base his statements that "counterfeiting" was going on at a certain location and was being conducted by the appellant and others. They had a right to know who he was, and whether or not he was

actually a participant, and what consideration had been given to him. This was denied to the appellant; and this, we respectfully urge, was serious error which should be given further consideration by this court.

CONCLUSION

The appellant respectfully asserts that this appears to be a case where both the trial court and this court have put the stamp of approval upon the proposition long since outlawed: "Did they have the evidence," NOT "How did they get it." And we again respectfully assert that it appears to us that both the trial court and this court have overlooked the proposition: "A search is not to be made legal by what it turns up." The appeal to necessity is not justified in this case.

U. S. v. Dire, 332 U. S. 581-594.

In asking for a rehearing, may we suggest that the basic constitutional question of search and seizure and the application of the Fourth and Fifth Amendments would warrant this case being referred to the court for hearing en bank.

We respectfully ask for a rehearing.

Respectfully submitted,

RUSSELL E. PARSONS
Attorney for Appellant,
Petitioner Herein
Sterling Edward Newcomb.

CERTIFICATE OF COUNSEL

State of California, County of Los Angeles—ss.

I, Russell E. Parsons, attorney for the Appellant Newcomb, do hereby certify that, in my opinion, the Petition for Rehearing is well founded, and that it is not interposed for delay.

I further certify that I have been asked to file this petition by the appellant and his attorney of record Paul Augustine.

Dated at Los Angeles, California, this 4th day of March, 1964.

/s/ RUSSELL E. PARSONS.

APPENDIX "D".

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit Excerpt from proceedings of Friday, March 13, 1964, before Barnes, Hamley and Duniway, Circuit Judges.

On consideration whereof and by direction of the Court, it is ordered that the petition of appellant filed March 5, 1964, and within time allowed therefor by Rule of Court, and valid extension thereof for a rehearing of above cause, be and hereby is denied.

APPENDIX "E".

FOURTH AMENDMENT:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FIFTH AMENDMENT:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. 471:

"471 OBLIGATIONS OR SECURITIES OF UNITED STATES.

'Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both'".

18 U.S.C. 474:

"474. PLATES OR STONES FOR COUNTERFEITING OBLIGATIONS OR SECURITIES.

"Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

"Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or

"Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

"Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

"Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

"Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving photograph, print, or impression, except by direction of some proper officer of the United States; or

"Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States—

"Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."